

**Babcock & Wilcox, B & W Construction Company
and Robert Mays. Case 9-CA-14115**

April 1, 1981

DECISION AND ORDER

On July 23, 1980, Administrative Law Judge Nancy M. Sherman issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions to the Administrative Law Judge's Decision and a supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and the brief and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge only to the extent consistent herewith, and to dismiss the complaint.

The Administrative Law Judge concluded that Respondent discharged employees Mays and Miller because of their protected concerted activity, thereby violating Section 8(a)(1) of the Act. We find merit in Respondent's exceptions to this conclusion.

According to the credited testimony, the essential facts are as follows: Respondent was engaged to erect two steam generators at the Reid Power Station at Sebree, Kentucky. Carpenters were hired to work on the Sebree project, and they were covered by the provisions of the collective-bargaining contract that Respondent had with the United Brotherhood of Carpenters and Joiners of America (the Carpenters). Marvin Ransom was the carpenter foreman on the job and he supervised eight carpenters in his work crew, including Robert Mays and Arthur Miller.

The carpenters constructed and maintained the scaffolds at the worksite and, until the scaffolding was completed, much of the other work at the project could not be started. During May 1979,² the carpenters were working on the scaffolding for each of the four pulverizers (referred to as A, B, C, and D) on the project site. The pulverizers are tall stack-like structures which feed fuel to the steam generator.

Sometime prior to the afternoon of May 24, the scaffold on Pulverizer B had been completed except for the installation of wooden handrails. At approximately 2 or 2:30 p.m. that day, Rudy Samic, the construction superintendent and Ran-

som's superior, was passing Pulverizer B and noticed several pipefitters standing about idly. Samic asked why, and Ransom said that the pipefitters were supposed to be working on Pulverizer B but that the pipefitter steward would not permit them to do the work until the handrails on the pulverizer had been installed. Samic then told Ransom that "we had to get that scaffold up, because we were getting behind in schedule on the coal pipe."

At 8 a.m. on May 25, the eight carpenters on the job gathered at the gang shack and Ransom gave them their work assignments for the day. The record does not reveal what the assignments were but after a detailed analysis of the testimony the Administrative Law Judge concluded that none of the carpenters was assigned to work on Pulverizer B. After receiving their orders, the carpenters left the gang shack and Ransom headed for the office. Before he reached the office, however, Samic stopped him and asked whether he "had them [sic] handrails on the scaffold on Pulverizer B," so the pipefitters could start working. Samic was "rather upset over the handrails," and the Administrative Law Judge found that Ransom untruthfully replied, "Yes sir, I am having it done. I have got two men on it." Ransom then turned back to the area where the pulverizer scaffolds were being erected.

Mays and Miller, as well as most of the other carpenters, were unhappy with Ransom's occasional practice of assigning different carpenters to start and finish a particular scaffold. This practice was considered unsafe since errors in workmanship, such as not tightening bolts by the starting carpenters, would not be apparent to carpenters assigned to finish the scaffold and might surface only after an accident had occurred. Consequently, Mays and Miller were displeased that morning when Ransom assigned them to complete a scaffold started by other carpenters. When they arrived at the scaffold, Mays and Miller did not send their helper, Lonnie Adcock, to obtain the materials needed to start on the job but decided first to discuss the matter with Ransom. They asked Wiseman, the job steward, to find Ransom while Mays and Miller waited in the pulverizer area.

Shortly after Wiseman left, Ransom appeared. Apparently upset after his conversation with Samic, he spotted Adcock and asked him why there were no materials for Mays and Miller to work with. Before he could answer Mays said that Adcock had not gotten the materials because Mays had not told him to, adding that he had been "waiting on" Ransom in order to speak to him about the job assignment he and Miller had received that morning. Mays asserted that it was dangerous for carpenters to work on scaffolds that

¹ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing her findings.

² All dates are in 1979, unless otherwise indicated.

were started by others and that Ransom should not make such assignments. Ransom replied that he had made this kind of assignment before and would do so again. The exchange became unpleasant and both Mays and Ransom were angry. Ransom asked heatedly whether Mays and Miller were going to complete the scaffold. Mays replied that he "truthfully" did not know. Miller, who had not participated in this discussion, said nothing. Ransom said, "If you're not, I'll get somebody else." Mays told him to do whatever he wanted to do. Ransom then told them to work on trash chutes and assigned two other carpenters to the scaffold job.

Later that morning Ransom met with Samic and told him that Mays and Miller refused to install handrails on the Pulverizer B scaffold. Samic reported this to Project Manager James Wilson, asserting that "apparently we had two fellows that had refused a direct order, to carry out an instruction that we passed on to our foreman that we wanted safety rails put up and these fellows refused to do it." Samic asked Wilson what should be done and Wilson replied, "Well, if that is the case . . . I think we better let them go."

Shortly thereafter, Samic and Ransom found Mays and Miller and told them that they were being discharged because they refused to do a job.

The collective-bargaining agreement which was in effect between Respondent and the Carpenters included the following provision:

The Employer agrees there will be no lockout and the Union agrees that there will be no stoppage of work or any strike of its members either collectively or individually until said dispute or misunderstanding has been referred to the International Office of the Union and arbitrated between such International Office of the Union and the Home Office Representative of the Employer.

There is no contention that Mays and Miller were not bound by this provision nor did the General Counsel rely on Section 502 of the Act in litigating the case.

The Administrative Law Judge found that Mays and Miller were discharged on May 25 because of conduct which constituted concerted activity protected by Section 7 of the Act and not because they "refused" in violation of the collective-bargaining agreement to perform jobs assigned to them by Ransom. She concluded that Mays and Miller did not refuse to do the work, relying on the absence of the word "refuse" during Mays' May 25 confrontation with Ransom, and on Ransom's failure at that time to inform Mays and Miller that if they did not do their jobs they would be discharged.

Contrary to the Administrative Law Judge, we find that Mays' and Miller's failure to perform their work assignment, coupled with Mays' statements to Ransom, established that Mays and Miller were refusing to do the work and that her reliance on Mays' omission of the word "refuse" to find otherwise was misplaced.³ We further find that, having validly concluded that Mays and Miller were refusing to do their work, Ransom had no obligation under the Act to inform them that they would be discharged if they continued to refuse to do the assigned job.

As stated above, on the morning of May 25, shortly after making the work assignments for the day, Ransom came upon Adcock, Mays, and Miller, who were standing idly by the pulverizer to which they had been assigned. Ransom asked Adcock why he was not getting the materials for the job since they could not begin without them. Mays interjected that he was responsible for not having sent Adcock for the materials because they had been "waiting on" Ransom to discuss their job assignment.⁴ Thus from the outset Ransom was on notice that the work to which Mays and Miller had been assigned was not being performed and that it appeared that they would not do the work. As the discussion between Mays and Ransom progressed, it was reasonable for Ransom to conclude from their conduct that Mays and Miller were in fact refusing to do the work. Specifically, in response to Ransom's query as to whether Mays and Miller were going to complete the pulverizer scaffolding, Mays replied that he "truthfully" did not know.⁵ Taken in conjunction with the failure to obtain materials for the job, it was reasonable for Ransom to interpret this response as a refusal. This was confirmed at the conclusion of the Mays/Ransom exchange when Ransom said, "If you're [not going to do the work], I'll get somebody else," and Mays told Ransom to do whatever he had to do.

In short, we find that by their conduct Mays and Miller led Ransom reasonably to believe that they

³ We further find the Administrative Law Judge's emphasis on Ransom's motives in discharging Mays and Miller similarly to be misplaced. We note that Ransom's motives, whatever their nature, were unconnected with Mays' and Miller's complaints concerning unsafe practices. As Mays admitted, until their discussion on the morning of May 25, Ransom was unaware of these dissatisfactions and there is nothing in the record to support the Administrative Law Judge's finding that it was Mays' and Miller's professed dissatisfactions and not the failure to do their assigned job that brought about their discharges.

⁴ We note that Miller could have sent Adcock for the materials and thus conclude that, by failing to do so, he acquiesced in Mays' decision not to begin work until Mays and Miller spoke to Ransom.

⁵ Mays testified that, during this discussion with Ransom, Mays " . . . was confused and [he] probably should have said 'Yes, I will, but don't give me this kind of assignment again.'" Regardless of any "confusion" on Mays' part, and regardless of what he "should have said," Mays' response to Ransom, under the circumstances, indicated that he was unwilling to do the work.

were refusing to do their assigned job. Since such a refusal violated the "no stoppage of work" clause in the collective-bargaining agreement, Respondent was within its rights in discharging them. Accordingly, we shall dismiss the complaint.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

MEMBER JENKINS, concurring:

I concur in the result.

DECISION

STATEMENT OF THE CASE

NANCY M. SHERMAN, Administrative Law Judge: This case was heard before me in Owensboro, Kentucky, on May 1, 1980, pursuant to a charge filed on July 20, 1979, and amended on September 10, 1979, and a complaint issued on September 14, 1979. The question presented is whether Respondent Babcock & Wilcox, B & W Construction Co., violated Section 8(a)(1) of the National Labor Relations Act, as amended (the Act), by discharging employees Robert Mays and Arthur Miller.

On the basis of the entire record, including the demeanor of the witnesses, and after due consideration of the briefs filed by Respondent and by counsel for the General Counsel, I hereby make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Delaware corporation which is engaged as a contractor in the construction of the Reid Power Station at Sebree, Kentucky. During the 12 months preceding the issuance of the complaint, a representative period, Respondent purchased and received goods and materials, valued in excess of \$50,000, which were shipped to its Sebree, Kentucky, facilities directly from points outside Kentucky. I find that, as Respondent concedes, it is engaged in commerce within the meaning of the Act, and that assertion of jurisdiction over its operations will effectuate the policies of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

At all times relevant herein, Respondent was bound by a collective-bargaining agreement with the United Brotherhood of Carpenters and Joiners of America (the Brotherhood), which required Respondent, *inter alia*, to hire journeyman carpenters through the Brotherhood's district councils or local unions having jurisdiction in the area. The Brotherhood affiliates with jurisdiction over the area which included the Sebree power plant were locals forming the Lower Ohio Valley District Council (the District Council).

Respondent's contract with the Brotherhood included an undertaking to "observe the working conditions established or agreed upon by the [Brotherhood] and the recognized bargaining agency of the locality in which any work of our Company is being done." The agreement between the District Council and the local employer bargaining agency provides that the selection and determination of foremen are the employer's responsibility; that, when two journeymen carpenters are employed on a given project, one shall be paid as a foreman; and that, when a foreman supervises the work of six or more journeymen, he is not required to work with his tools. In April 1978, at a time when no carpenters were working on the Sebree power plant job, Respondent hired carpenters James Wiseman and Marvin E. Ransom through Carpenters' Local 601, a District Council affiliate, to work on that job. Wiseman was designated as the carpenter steward on the job, and Ransom was designated as the carpenter foreman. Ransom had never before served as foreman on any job, and never received any training as a foreman. However, he was still carpenter foreman at the time of the May 1979 events material here, when Respondent had eight nonsupervisory carpenters on that job.

About November 1978, Ransom called Local 601 for two carpenters, and asked who was "on the book." Local 601 follows the practice of referring the carpenters whose names have longest appeared on the out-of-work list, unless the employer objects to these individuals. Respondent's contract with the Brotherhood gives Respondent the right to reject applicants referred by Brotherhood affiliates. Local 601 advised Ransom that its referral practice called for the referral of Robert Mays, and asked Ransom whether he had any objection to Mays. Ransom replied that Mays would be "fine." Mays and Ransom, who is several years older than Mays, had known each other since Mays was 8 years old; he was 29 at the time of the May 1980 hearing. They had gone to the same grammar school, and on one or two occasions had gone hunting and fishing together. Mays testified that, before these excursions, their relationship had been friendly at times and unfriendly at times.¹ After about May 1978, a year before Mays' discharge, they saw each other only on the job, and did not see each other socially. Ransom testified that, before Mays' November 1978 hire on the project, he and Ransom were "real good friends." Mays testified that as of May 25, 1979, the date of his discharge, "I felt like [Ransom] was a friend," but Mays denied wanting Ransom to do anything for him.

Respondent's carpenters work in pairs. About early January 1979, Mays learned that Respondent planned to hire two more carpenters. Mays thereupon told Ransom that Mays had worked on another project with Arthur Miller, said that Miller was a good worker, and asked Ransom to consider hiring him. Under the practice followed at the Local 601 hiring hall, Miller would be referred if Respondent requested him by name, because he had already worked on the project and had then been

¹ At the time of the May 1980 hearing, Ransom resided in Spottsville, Kentucky. Mays' address when he was discharged in May 1979. Spottsville's population is about 500.

laid off for lack of work. In accordance with Mays' request, Ransom did ask for Miller by name, and, accordingly, Local 601 referred him to the Sebree job. After Miller's rehire on January 29, 1979,² he and Mays worked as a team.

B. Events Allegedly Leading to the Discharges

The work to be performed by carpenters on the Sebree job consisted primarily of the construction and maintenance of scaffolds for other trades, especially the pipefitters. Among the scaffolds to be constructed was a scaffold at each of four pulverizers in a row which is referred to in the engineering drawings as "Unit 2." The drawing describes these four pulverizers as A, B, C, and D, respectively, and they were so referred to at the hearing,³ but they were not so described during the employment-management discussions involved in this case.

At an undisclosed date and hour before early afternoon on Thursday, May 24, the scaffold on pulverizer B had been completed except for the installation of wooden handrails. That afternoon Construction Superintendent Rudy Samic, who was Carpenter Foreman Ransom's superior, noticed that several pipefitters were standing idly by. At 2 or 2:30 p.m., 2 or 2-1/2 hours before the 4:30 p.m. end of the workday, Samic ascertained from Ransom that the reason why the pipefitters were not working was that they were supposed to be working from the pulverizer B scaffold and the pipefitter steward had pulled all six off that scaffold because of the absence of handrails.⁴ As soon as Samic found out why the pipefitters were idle, he told Ransom that "we had to get that scaffold up, because we were getting behind schedule on the coal pipe" (see *infra*, fn. 5). Installation of the handrails would take an hour and a half, and could probably have been completed by the close of that same May 24 working day.⁵ Ransom did not assign anyone to install these handrails on May 24.

At 8 a.m. on Friday, May 25, Ransom met in the gang shack with Respondent's eight carpenters, and issued them their job assignments for that day. For the reasons set forth *infra*, I find that at that time he did not instruct any carpenters to install the handrails on the pulverizer B scaffold, and that he directed Mays and Miller to complete the pulverizer C scaffold or (less probably) the pulverizer D scaffold.⁶ Mays and Miller voiced no immediate objections to this assignment. After all the assignments were issued, the carpenters, including Mays, Miller, and Ransom, left the gang box. Ransom headed

toward the office. In front of the office, he encountered Samic, who asked Ransom whether he "had them handrails on that scaffold on Pulverizer B," so that the pipefitters could start working from that scaffold.⁷ Ransom, who testified that Samic was "rather upset over the handrails," untruthfully replied, "Yes sir, I am having it done. I have got two men on it." Then, Ransom abandoned his walk to the office and, instead, headed for the feeder floor, which was the work area nearest the unit 2 pulverizer scaffolds.

With the possible exceptions of Charlie Lewis and David Reynolds, all the rank-and-file carpenters on the project—including Mays, Miller, and Steward Wiseman—had discussed among themselves what they believed to be favoritism in Foreman Ransom's job assignments and what they believed to be his unsafe practice in sometimes assigning carpenters to complete scaffolds which had been started by other carpenters. However, there is no evidence that any members of management had ever been advised of the carpenters' dissatisfaction in this respect. Reynolds and Lewis were the carpenters who before May 25 had worked on the scaffold assigned to Mays and Miller on May 25. However, when issuing work assignments on the morning of May 25, Ransom had assigned Reynolds and Lewis to constructing trash chutes. It is unclear whether this was easier work than finishing the scaffold which they had started, but the trash-chute assignment was at ground level and was shown to be safer work.⁸ After being advised in the gang box of the initial May 25 work assignments, Mays and Miller proceeded to the feeder floor, which is at a level above the gang box and is the work level nearest the unit 2 pulverizer scaffolds. They were accompanied by Lonnie Adcock, a laborer with whom Mays and Miller usually worked as a three-man team. When the three reached the feeder floor, they found that carpenters could not begin work on the scaffold immediately, because the necessary materials were not in the area. Such an absence of material occurs frequently, and the carpenters have to wait, sometimes as long as 2 hours, until the necessary materials arrive at the worksite. If Mays and Miller had intended to begin the scaffold assignment themselves as promptly as possible, Mays or (less probably) Miller would have instructed Adcock to obtain the materials.⁹ However, Mays remarked to

² All dates hereinafter are 1979 unless otherwise indicated.

³ The engineering drawing admitted into evidence does not include pulverizer A.

⁴ My finding as to the hour of the day when this Samic-Ransom conversation occurred is based on Samic's testimony, and is also set forth in Respondent's brief. For demeanor reasons, I do not accept Ransom's testimony that the conversation occurred "late in the afternoon."

⁵ In view of this circumstance, the consequent probabilities of the situation, and demeanor considerations, I do not accept Ransom's testimony that Samic told him to have the handrails installed the first thing on the following morning. Rather, I accept Samic's version of the conversation. See, also, *infra*, fn. 7, and attached text.

⁶ For purposes of this case, it can make no real difference whether Mays and Miller were assigned to the pulverizer C scaffold or to the Pulverizer D scaffold; the only material point is that they were not assigned to the pulverizer B scaffold.

⁷ If Samic had not expected Ransom to assign the handrail installation until that morning, he could not have expected the 1-1/2 hour installation job to be completed by that hour. Accordingly, the quotation, from Ransom's testimony, indirectly corroborates the credibility finding described *supra*, fn. 5.

⁸ Miller testified at one point that, although the trash-chute work was safer work than the scaffold work, the trash-chute work was not easier. However, Miller elsewhere testified that one of the participants in the Miller-Mays discussion immediately following Ransom's initial assignments said that Ransom was "taking care of" Reynolds and Lewis and giving Miller and Mays "all the harder work to do." Miller further testified that as to the scaffold on which Reynolds and Lewis worked before May 25, and to which Miller and Mays were initially assigned on May 25, the easier part of the work was the beginning. Mays credibly testified to the belief that, except in emergencies, Ransom assigned Lewis and Reynolds to work on the ground and others to work on scaffolds.

⁹ Ordinarily, Mays would assume this responsibility, but Miller also had the authority to issue such instructions to Adcock. Upon receiving

Continued

Miller that he "hated to get out on something that may not be tightened up, to fall or something like that." Mays was thereby referring to his belief, which he had previously discussed with other carpenters including Miller, that a carpenter who worked for the first time on a partly completed scaffold might suffer a 75-foot fall in consequence of a possible failure by the carpenters who had previously worked on it to get around to the final tightening of some of the points or pieces.¹⁰ Miller told Mays that Miller agreed. Also, Mays and Miller talked to Steward Wiseman about the foregoing objections to Mays' and Miller's job assignment, and asked Wiseman to get hold of Foreman Ransom, whereupon Wiseman left the area. Neither Mays nor Miller instructed Adcock to obtain the materials, which, of course, would have been needed by whichever carpenters that eventually completed the scaffold.

While these discussions were taking place, Mays, Miller, and Adcock were standing at the head of the north stairway which led up to the feeder floor, and at a point where pulverizer D was the closest pulverizer and pulverizer C was the next closest. The employees had reached this point no earlier than 8:05 p.m., and perhaps as late as 8:15.¹¹ At or about 8:20 a.m.,¹² and before he could have been contacted by Wiseman, Foreman Ransom appeared. Samic had just reminded him about the handrails on the pulverizer B scaffold, and he was cursing in a loud voice, but not directly at anybody. Ransom asked Adcock why there was no material for Mays and Miller to work with. Mays said that Adcock had not brought any material because Mays had never told him to get any, and that Mays had been "waiting on" the foreman in order to speak to him about the job assignment. Mays went on to say that he did not like getting on a scaffold which somebody else had started, that on several previous occasions Ransom had assigned to complete a scaffold two partners who had not started the scaffold, and that such an assignment was "just a little dangerous" because the second set of partners, unlike the first set, might not know that at quitting time some parts

such instructions, Adcock would have obtained the materials, attached them to the hook of a crane, and had the crane operator move them to the feeder floor near the scaffold. Then, Adcock or another laborer would have removed the materials from the crane.

¹⁰ On cross-examination, Mays testified that nothing prevented the newly assigned carpenters from checking the last part of the work done by the last two workmen, "but you might climb up on it and not think . . . about checking it . . . Ralph Woods didn't." Respondent's regional representative, William R. Klingler, testified that scaffold building is "[t]remendously significant because people working on there are going to put their lives in the hands of those that built the scaffold."

¹¹ This finding is based on the evidence that the gang-box assignments had been given out at 8 a.m. The gang box is about 6 minutes from the office, and the office is 5 to 10 minutes from the site of the pulverizers. The record fails to show the distance from the gang box to the site of the pulverizers, or the relative positions of these three locations.

¹² This finding is based on Mays' testimony, which is corroborated by Samic's testimony that his conversation with Ransom early that morning just outside the office occurred shortly after 8 a.m.; Ransom's testimony that this conversation took place about 6 minutes after he completed the 8 a.m. assignments and that, immediately thereafter, he headed for the area of the unit 2 pulverizers; and Mays' testimony that walking from the office area to the area of the unit 2 pulverizers takes 5 to 10 minutes. In view of the foregoing, I do not accept Ransom's testimony that he did not reach the area of the unit 2 pulverizers until 9 a.m., or Miller's testimony that Ransom arrived at 8:30.

of the scaffold were up but not tight. Ransom said that he did not care about what Mays did not like, that Ransom had taken this kind of assignment before, and that he would do it again. Then, Ransom heatedly asked whether Mays and Miller were going to complete the scaffold. Mays replied that he "truthfully" did not know; Miller said nothing. Ransom said, "If you're not, I'll get somebody else." Mays told him to do whatever he wanted to do. Then, Ransom told Miller and Mays to go to work on the trash chutes. These were being assembled in a lean-to shack near the office, and Ransom said that he would be "over there" in a few minutes—meaning, according to Ransom's testimony, that he was going over to the office to talk to Samic about the matter. It is uncontradicted that, during this conversation, Ransom never told the employees that they would be discharged or disciplined unless they performed the scaffold work. Mays credibly testified that, the previously summarized remarks aside, the employees were never instructed or ordered to perform this work. Mays and Miller credibly testified that, such remarks aside, they never refused to perform this work.

After Mays and Miller had left the area, Ransom happened to see in the area the laborer who usually worked with Reynolds and Lewis, the carpenters who before May 25 had constructed the already-standing portion of the scaffold assigned on May 25 to Mays and Miller, but whose initial May 25 assignment was the construction of the trash chutes. Ransom told this laborer to send over Reynolds and Lewis to complete the scaffold whose completion had been Mays' and Miller's initial May 25 assignment.¹³

Mays credibly testified that, during his conversation with Ransom, both of them were "mad." Miller credibly testified that, up to the point when Ransom said he would get someone else to do the job (at which point Ransom "calmed down some"), both Ransom and Mays were angry. More specifically, Miller credibly testified that Ransom spoke somewhat louder and faster and used more profanity than normal, that his face turned red, and that Mays raised his voice somewhat and used some profanity.¹⁴

Ransom testified that, after Mays and Miller had left for the trash-chutes assignment, Ransom had a conversation with Steward Wiseman (see *infra*) which ended about a half hour after Ransom had reached the area of the pulverizers—that is (on the basis of the credible testimony about when Ransom had arrived), about 8:50 a.m. There is no credible direct evidence as to which carpenters installed the handrails on the pulverizer B scaffold or when such installation was begun, and there is no direct evidence at all about the date or hour of completion of their installation, a 1-1/2-hour job. Some time after 11 a.m., more than 2 hours after reassigning Mays

¹³ My finding that Ransom spoke to the laborer after Mays' and Miller's departure is based on Mays' testimony that he did not know how Reynolds and Lewis were given their reassignment. I believe Ransom was mistaken in testifying that Mays and Miller were still there.

¹⁴ My findings as to the Ransom-Mays conversation are based mostly on a composite of Mays' and Miller's testimony. For demeanor and other reasons summarized *infra*, I discredit much of Ransom's version of the conversation.

and Miller, Ransom went into Construction Superintendent Samic's office.¹⁵ Ransom told Samic that Mays and Miller had "refused" to install the "handrail" or "safety guardrail" on the scaffold about which Samic had reminded Ransom shortly after 8 that morning—that is, the pulverizer B scaffold.¹⁶ Then, Samic went into the office of Project Manager James Wilson and reported that "apparently we had two fellows that had refused a direct order, to carry out an instruction that we passed on to our foreman that we wanted safety rails put up and these fellows had refused to do it." Samic asked Wilson what he thought should be done. Wilson said, "Well, if that is the case . . . I think we better let them go."

Samic and Ransom thereupon approached Mays and Miller in the lean-to shack and told them that they were being discharged because Ransom had told Samic that Mays and Miller had refused to do a job and Samic did not need people like that working for him. Samic went on to say that Mays and Miller could pick up their checks in the office. At this point, Samic turned around and left the lean-to shack. Mays and Miller gathered up their tools, went into the office, and called Samic out of his office to talk to him about the situation. Mays said that he had not refused an order, and alleged that Ransom had been discriminating against Mays and Miller and in favor of others with respect to job assignments. Miller said that he did not understand Samic's firing Mays and Miller like that, that they had not refused an order, and that Miller had not said a word. Samic said that Miller's actions indicated that he had refused to do the job, that Samic had nothing against Mays and Miller personally, but that Ransom was Samic's foreman and Samic had to take his word for what was going on. Mays and Miller then got their checks, picked up their tools, and left the job.¹⁷ Thereafter, Samic arranged for an entry in Respondent's records stating that both men were discharged for "Refusing to perform the duties as directed."

A few days later, Mays and Miller came back to the project in the company of Local 601's business agent, Howell. They went with Ransom into Project Superintendent Wilson's office, and asked him to reinstate the employees. Wilson said that they were discharged, that was the way it was going to stay, and that he did not want to hear any more about it. After everyone but

Wilson had left his office, Miller asked Ransom why he had fired Miller and Mays. Ransom replied, "I didn't fire you. Mr. Samic did." Then, Howell asked that Samic be sent for. When Samic arrived, Howell asked him to reinstate both employees, but Samic refused. Ransom then said, in the presence of the entire group, that Miller had not refused to work, and that Ransom would like to hire him back. Samic said, "I thought you said he refused too." Ransom said, "No, he didn't." Howell asked Samic to take back Miller, at least, on the ground that, according to Miller, he had not "verbally" said he would not do the job. Ransom told Samic that the representation attributed to Miller was true, and Samic agreed to reconsider Miller's case. A few minutes later, Ransom privately told Samic that firing Miller might have been a little hasty because he did not "verbally state" that he would not do the work, that Miller's excuse was that he did not have any material, and that Ransom would like to get Miller's job back for him. In Ransom's presence, Samic then talked the matter over with Project Superintendent Wilson, who told Samic to do whatever he thought was right. After Ransom and Samic had left Wilson's office, Ransom again asked Samic to rehire Miller, on the ground that he had not "verbally" refused to do the work and could not have done it all by himself. Then, Samic came out and told the employees and the union representatives that Respondent would reinstate Miller, but would not reinstate Mays because Mays had specifically refused. There is no evidence that anyone present, including Mays and Miller, then denied that Mays had "specifically refused." Howell asked Samic to change Mays' termination from discharge to layoff in order to enable him to collect unemployment benefits. Respondent refused. During this conversation, nobody asserted that Respondent had fired Mays and Miller for protesting favoritism. Thereafter, on May 31, Miller was admittedly reinstated.

Later, Mays, who at that time lived in Spottsville, Kentucky, telephoned the National Labor Relations Board's Regional Office in Cincinnati, Ohio, about 215 miles from Spottsville. Mays said that he had been fired and wanted somebody to investigate his discharge. The Board agent on the telephone said that no investigation could begin until he signed a charge. Thereafter, the Board agent mailed Mays a charge form which contained the typewritten allegation that Respondent had violated Section 8(a)(1) and (3) of the Act by discharging Mays in order to discourage membership in Carpenters Local 601. Although Mays did not think that he had been fired for this reason, and believed that he had been misunderstood by the Board agent to whom he talked on the telephone, he signed the charge on July 16, 1979, and mailed it back to the Regional Office. The charge states, "Wilfully false statements on this charge can be punished by fine and imprisonment." On September 4, 1979, Mays signed an amended charge alleging that Respondent had violated Section 8(a)(1) by discharging him and Miller "in order to discriminate against them because of their protected concerted activities."

¹⁵ My findings as to the time of day is based on Samic's testimony, indirectly corroborated by the testimony of Mays and Miller about how long they worked on the trash chutes before their discharge. I do not accept Ransom's hour of 10:10 a.m. In any event, the area of the pulverizers is a 5- to 10-minute walk from Samic's office, and Ransom gave no testimony about how he spent the remaining portion of the time between the alleged Ransom-Wiseman conversation, which ended about 8:50 a.m., and his conversation with Samic.

¹⁶ This finding is based on Samic's testimony and credible portions of Ransom's testimony. I do not accept Ransom's further testimony that, when Samic asked who had done this, Ransom replied Mays, whereupon Samic asked whether Miller was making an attempt to do the job and Ransom replied no. Such testimony by Ransom presumes more knowledge by Samic about the incident than he probably had at that point. Moreover, such testimony by Ransom is inconsistent with the credible evidence (see *infra*) regarding Respondent's reasons for later taking Miller back.

¹⁷ My findings as to the discharge interviews are based on a composite of Mays' and Miller's testimony. For the reasons set forth *infra*, I do not accept the versions of Ransom and Samic.

At all relevant times, the collective-bargaining agreement between Respondent and the Brotherhood included the following provisions:

The Employer agrees there will be no lock-out and the Union agrees that there will be no stoppage of work or any strike of its members either collectively or individually until said dispute or misunderstanding has been referred to the International office of the Union and arbitrated between such International Office of the Union and the Home Office Representative of the Employer.

As previously noted, Miller and Mays had been referred for employment by Local 601, which is contractually obligated to refer employees on a "non-discriminatory basis," and both of them successfully induced Local 601's business agent to try to persuade Respondent to take them back. Moreover, Mays signed a charge (which, however, he believed to be inaccurate) alleging that Respondent had discharged him to discourage membership in Local 601. This evidence aside, there is no evidence that Mays and Miller were "members" of any affiliate of the Brotherhood. However, the General Counsel makes no contention that they were not "members" within the meaning of the foregoing contractual provisions. Also, although Respondent is engaged in the building and construction industry within the meaning of Section 8(f) of the Act, the General Counsel disavowed on the record any contention that any part of this contract is not binding upon the members of the bargaining unit because of Section 8(f), and stated that that might give the same effect to any provisions of this contract that I would if the building and construction industry were not involved at all. Further, the General Counsel disclaimed on the record any reliance on Section 502 of the Act.

C. Reasons for Credibility Findings

1. The identity of the scaffold assigned to Mays and Miller and related matters

Foreman Ransom credibly testified that on May 25 the pulverizer B scaffold was complete and ready to be used by the pipefitters, except that there were no handrails on the platform. Ransom further credibly testified that on that day a needle beam, pickboards, and some more tube scaffold had to be installed on the pulverizer C scaffold; the pulverizer D scaffold had "[n]othing even near completion"; the pulverizer A scaffold was complete and had already been used by the pipefitters; and no scaffold at all had to be modified. Also, Ransom testified that, when he "went up to where [Miller and Mays] were supposed to be putting the handrails on the scaffold," they were standing with laborer Adcock at the head of the north stairway to the feeder floor—that is, more than 65 feet from pulverizer B—and that pulverizer D was the one they were standing the nearest to. The record shows that pulverizer C was the pulverizer nearest to pulverizer D, that it was the south stairway which was closest to pulverizer B, and that the north stairway and the south stairway were equidistant from the gang box, in other words, that the natural route to pulverizer B from the lo-

cation where Mays, Miller, and Adcock received their assignments would have been the south stairway. Mays testified that, after leaving the gang box, he and Miller went to the area where they were supposed to be working; that the scaffold to which he and Miller were assigned was "one of the two middle ones"—that is, the pulverizer B or the pulverizer C scaffold; that "[j]ust about all" of the scaffold assigned to him and Miller had to be done—a description which would not fit the pulverizer B or A scaffolds, but would fit the pulverizer C and D scaffolds; and that "[t]he north stairway was directly over the pulverizer or beside the pulverizer we were working on"—a description squarely applicable to pulverizer D, but more applicable to pulverizer C than to pulverizer B.¹⁸ Miller testified on cross-examination that he did not know "to this day" which of two scaffolds he had been assigned to, but, as previously noted, Mays' conversation with Ransom in Miller's presence took place at a point beyond the northernmost (D) pulverizer, with the next nearest pulverizer being pulverizer C.¹⁹ On rebuttal, Miller credibly testified that, when giving him his work assignment that morning, Ransom told him to complete hanging the pickboard—a task which admittedly had to be performed on the pulverizer C scaffold but not on the pulverizer B scaffold.²⁰ Furthermore, Mays testified without contradiction that, in trying to induce him and Miller to begin work on the scaffold immediately, Ransom made no reference at all to any particular immediate need for its completion—an urgent matter for the pulverizer B scaffold but not for the other uncompleted scaffolds.²¹ In view of the foregoing, I find that on May 25 Ransom assigned Mays and Miller to the pulverizer C scaffold or (less probably) the pulverizer D scaffold. In accordance with this finding, I credit the testimony of Mays and Miller that neither Ransom nor Samic made any reference that day to

¹⁸ The pulverizers are in a row, with pulverizer A on the south and pulverizer D on the north. The north stairway is a little north of pulverizer D.

¹⁹ Miller's description on cross-examination of one of the two scaffolds he might have been assigned to is plainly inapplicable to the pulverizer B scaffold, and appears more appropriate to the pulverizer C scaffold than to the pulverizer D scaffold. His description of the other scaffold does not really fit any of them, although it appears more appropriate to the pulverizer A and B scaffolds than to the pulverizer C or D scaffold. He testified that this other scaffold had already been used as such and was to be modified by the construction of an addition. Ransom credibly testified that the pulverizer A scaffold had been completed and used, and that none of these scaffolds had to be modified in any sense.

²⁰ Miller also testified at this point that Ransom indicated that the pickboard was to be hung on the pulverizer C scaffold. Also, at one point during Miller's initial direct examination, he testified that he thought, but was not positive, that he had been assigned to the pulverizer C scaffold. However, I give no weight to this testimony, in view of his testimony during his first cross-examination that he did not know "to this date" which scaffold he had been assigned to.

²¹ Miller testified that he could not recall any mention of having to get the pipefitters up on the scaffold. Mays testified that he was aware that the pipefitters were "waiting on" the assigned scaffold and, in effect, that they could not use it until the handrails were on it. However, all the unit 2 scaffolds were for the pipefitters' use, and at least two of the three in-completed ones were supposed to have handrails. Miller testified that at least one of the two scaffolds to which he might have been assigned (see *supra*, fn. 19) would have called for cable handrails, not the wooden handrails to be installed on the pulverizer B scaffold.

handrails that needed to be constructed.²² I discredit the contrary testimony of Samic (not corroborated by Ransom as to Samic's remarks in Ransom's presence) and Ransom, and discredit Ransom's testimony that he assigned Mays and Miller to the pulverizer B scaffold.²³

In contending that Mays and Miller were assigned to the pulverizer B scaffold, Respondent relies partly on Samic's testimony to that effect. However, Samic necessarily relied on what Ransom had told him, and I conclude that Ransom told Samic that Mays' and Miller's May 25 conduct was directed to the pulverizer B scaffold in order to conceal the fact that Ransom, an inexperienced foreman, had forgotten the urgent May 24 instructions of Samic, his superior, to have the handrails installed on that scaffold in order to permit its use by six pipefitters who were standing idly by and who were supposed to be using it to perform a job which was getting behind schedule.²⁴ That Ransom did so forget is a likely explanation for his admitted failure to direct anyone on May 24 to install the handrails (although this task could probably have been completed by the end of the day), and fits in with the credible testimony about what occurred on May 25.

2. The May 25 discussion between Foreman Ransom and employees Mays and Miller

As previously noted, my findings about the May 25 discussion between Foreman Ransom and employees Mays and Miller are based mostly on the testimony of the employees, whom for demeanor reasons I regard as more truthful witnesses than Ransom. Furthermore, the employees' personalities as evinced on the witness stand seemed to me more consistent with the conduct which they testimonially attributed to themselves than with the conduct which Ransom testimonially attributed to them. Moreover, whether Mays had (as Ransom testified) flatly refused to perform the work or had merely made the remarks to which the employees testified, it is improbable that they would have failed to advise Ransom of the safety considerations which underlay their conduct, and even more improbable that Ransom would not have asked them or their steward for an explanation, if none had been volunteered, for their not wanting to work on a scaffold which had been started by somebody else.²⁵

²² Because Samic's May 25 knowledge of the incident was limited to what Ransom told him, his failure to mention the handrails is significant mostly because, if he had, Mays and Miller would perhaps have corrected him.

²³ Ransom testified that he assigned Greg Cron to the pulverizer C scaffold that day, and did not testify that anyone was assigned to the pulverizer D scaffold. However, Ransom professed inability to recall his assignments that morning to Eddie Lord or Eddie Joe Herrin, although the fact that all of Respondent's eight carpenters worked in pairs shows that one Eddie must have been working with Wiseman on a scaffold not connected to the pulverizers and the other Eddie must have been working with Cron. Mays' testimony suggests that Cron's partner was Eddie Lord.

²⁴ Ransom's absentmindedness would appear to be even more blameworthy in view of his failure to take immediate action upon learning, as he did before Samic learned, about why the six pipefitters were idle.

²⁵ Mays and Miller both denied previously talking to Ransom about the employees' objection to such assignments. Nor is there any evidence that Ransom had previously learned of such objections from any other source. Further, the fact that he had assigned Mays and Miller to a scaffold started by Reynolds and Lewis, while assigning the latter two em-

However, Ransom gave no testimony that he had received or requested such an explanation. Furthermore, although the substance of even Ransom's version of the employees' complaint compels the inference that they had not previously worked on the scaffold to which they were assigned on May 25 and Ransom testified that, on that date they were assigned to the pulverizer B scaffold, Ransom testified that he did not recall whether they were assigned to that scaffold on May 24.²⁶ Moreover, as previously indicated, I discredit Ransom's testimony that his directions to Mays and Miller specifically mentioned the installation of handrails, and credit the employees' testimony otherwise. Accordingly, I discredit Ransom's testimony that Mays said in Steward Wiseman's absence and again in his presence that the employees would not put the handrails on the scaffold, and credit the employees' version of the conversation, including their denials that Wiseman was present at any time during Mays' conversation with Ransom.

Respondent's counsel contended at the hearing and in his brief that Steward Wiseman's failure to testify should create an adverse inference against the General Counsel about the content of the May 25 Mays-Ransom conversation, on the ground that the General Counsel admittedly knew before the hearing that Respondent was taking the position that Wiseman was present when Mays allegedly told Ransom that Mays was refusing to do the work, whereas Respondent did not know before the hearing that the General Counsel's witnesses Mays and Miller would deny that Wiseman was present during any part of Mays' and Miller's conversation with Ransom. On the other hand, the General Counsel contends in his brief that Wiseman's failure to testify should create an adverse inference against Respondent, on the ground that at the time of the hearing Wiseman was still employed by Respondent. Respondent's counsel stated at the hearing that Respondent had specifically considered the possibility of calling Wiseman and had forborne for "reasons of labor relations policy," as well as for the reason that Respondent had thought his testimony would be cumulative. Respondent's counsel stated on the record, immediately before resting, that he was deliberately refraining from asking me in advance to deal with the question of whether I would like to have Wiseman's evidence. Both Mays and Miller denied before the 1:05 lunch break in the 1-day hearing, which was held on a Thursday between 10 a.m. and 5 p.m., that Wiseman was present during this conversation. Neither party requested a continuance of the hearing, which was held about 30 miles from the construction site, in order to produce Wiseman. I conclude that his failure to testify does not create an adverse inference against either party.

Respondent also suggested at the hearing that Mays' testimony is unworthy of belief because he signed a charge alleging that he had been discharged to discour-

employees to perform work of which Mays and Miller were capable, suggests that the risks of changing employees in midscaffold had never occurred to Ransom. Moreover, Ransom eventually did assign completion of the disputed scaffold to the carpenters who had started it.

²⁶ However, the credible evidence fails to show whether on May 24 any carpenters worked on the pulverizer B scaffold.

age membership in Carpenters Local 601, although he did not think he had been discharged for this reason and believed that he had been misunderstood by the Board agent who prepared the charge.²⁷ However, Mays testified that he had telephoned the Regional Office to obtain an investigation of his charge, and that the Board agent then told him that no investigation could begin until he signed a charge. I infer that he signed his charge in order to obtain a prompt investigation rather than for any purpose to mislead. Accordingly, I give little weight to Mays' having signed the original and inaccurate charge. In any event, the critical portions of his testimony were corroborated by Miller.

3. The discharge interview

Ransom and Samic both testified that, in the lean-to shack, Samic asked Mays and Miller whether they had "refused" to do what Ransom had told them to do, and that Mays admitted it. Samic, but not Ransom, further testified that during this same conversation Samic asked the employees whether they had instructed the laborer not to carry the material in, that Mays admitted that too, and that Mays went on to say that he did not feel it was right to go to work on something that somebody else had not completed. Also, Samic, but not Ransom, testified that during this same conversation Miller remarked that, because he had said nothing during the Ransom-Mays conversation, Miller should not be discharged, and Samic said that Miller's actions spoke as loud as his words, and he was being let go because he made no effort to do anything. Because of my previous finding that Mays and Miller were never told their job on the scaffold consisted of installing handrails, that Mays did not say to Ransom on the jobsite that Mays and Miller refused to work on the scaffold, and that Mays neither told the laborer not to bring materials nor advised Ransom on the jobsite that Mays had issued such instructions, I discredit the testimony of Samic and to some extent Ransom that Samic accused them of such conduct and Mays admitted it.²⁸ Also, because Ransom left the area after the lean-to conversation, because he did not corroborate Samic's testimony that this conversation included references to Mays' complaints about Samic's assignment policy and Miller's silence during the Mays-Ransom conversation on the feeder floor, and because Mays and Miller testified that they discussed these subjects with Samic in the office a few minutes later, I do not accept Samic's denial of any conversation with them in the office.

²⁷ Mays testified that, before his and Miller's conversation with their foreman about the employees' objection to their work assignment, they had told their union steward about these objections and had asked him to get in touch with their foreman. While Mays further testified that the steward could not have gotten in touch with their foreman before his conversation with Mays which led to the employees' discharge, Mays may not have mentioned this during his telephone conversation with the Board agent, who when drafting the original charge may have inferred that there had been such a contact and that Mays' union activity in complaining to his steward may have played a part in Mays' discharge.

²⁸ Ransom's and Samic's credibility is further drawn into question by the conflict in their testimony about whether Ransom asked the employees if they wanted the job steward. For demeanor reasons, I credit Samic's denial, which is corroborated by Mays and Miller.

D. Analysis and Conclusions

The undisputed evidence shows that, on various occasions before May 25, many of the carpenters, including Mays and Miller, had discussed among themselves what they believed to be deficiencies in Foreman Ransom's assignment policies, including what they believed to be his unsafe practice in sometimes assigning carpenters to complete scaffolds started by other carpenters. Moreover, after receiving such an assignment from Ransom on May 25, Miller told Mays that Miller agreed with Mays' expressed dislike of risking a fall by going out on the assigned scaffold, and both of them told Steward Wiseman that they wanted to talk to Foreman Ransom about the assignment. The foregoing evidence establishes that, when Mays and Miller refrained from immediately taking the first step (telling Adcock to get the material) in connection with continuing the erection of the scaffold and when Mays explained the employees' inaction to Ransom on the ground that the assignment to Miller and Mays was "just a little dangerous" because the scaffold had been started by others, Mays and Miller were engaging in conduct which, at least absent a collective-bargaining agreement forbidding it, constituted concerted activity protected by Section 7 of the Act.²⁹

Respondent contends that the action taken against Mays and Miller did not violate the Act because Ransom did not know that their action was concerted in nature. Respondent points to the fact that, in explaining to Ransom why his work assignment was not being carried out, Mays said that "I" did not like getting on a scaffold which others had started, and that "I" had failed to tell the laborer to get the material. However, Miller credibly testified that, after telling Mays that Ransom did not care about what Mays did not like, Ransom asked whether "you all" were going to complete the scaffold. Furthermore, Samic testified, that before the discharge of Mays and Miller, Ransom told Samic that "two of the carpenters . . . had refused to carry out instructions . . . the two fellows that he had assigned to do that particular job . . . had refused to do it." Also Samic testified that he told Project Manager Wilson that "two fellows had refused" to put up safety rails. Moreover, in connection with Miller's May 25 protest of his discharge on the ground that he had said nothing, both Samic and Miller testified that Samic said Miller's actions indicated he had refused to do the job. This evidence persuades me that Respondent knew at all relevant times that Mays and Miller were engaged in concerted activity in connection with Ransom's initial work assignment.³⁰

Respondent further contends that the employees' conduct was deprived of statutory protection by the contractual provisions forbidding strikes and "stoppage[s] of

²⁹ *N.L.R.B. v. Halsey Taylor Co.*, 342 F.2d 406 (6th Cir. 1965); *Morrison-Knudsen Company, Inc. and Hawaiian Dredging and Construction Company, a Division of Dillingham Corp., a Joint Venture*, 149 NLRB 1577 (1964), *enfd.* 358 F.2d 411 (9th Cir. 1966); *Pacific Electriccord Company*, 153 NLRB 521 (1965), *enfd.* 361 F.2d 310 (9th Cir. 1966).

³⁰ Accordingly, I need not and do not determine whether the complaint should be dismissed if Respondent had in fact been unaware that Miller shared in Mays' efforts to obtain a supposedly safer job assignment for both of them. Cf. *Air Surrey Corporation*, 229 NLRB 1064 (1977), enforcement denied 601 F.2d 256 (6th Cir. 1979).

work." Respondent contends that a refusal by Mays and Miller to work on the assigned scaffold would constitute a violation of this contractual provision, and that, even accepting (as I have) the employees' version of their conversation with Ransom, what they said and did amounted to a refusal which constituted a contractually forbidden work stoppage. I disagree with Respondent's characterization of their conduct. Thus, the credible evidence shows that, when Ransom asked whether Mays and Miller were going to complete the scaffold, Mays replied that he "truthfully" did not know, and that, although Miller said nothing, Respondent at all times on May 25 acted as if it regarded Mays as speaking for Miller—an assumption with which I agree in view of Miller's passive behavior during this incident. Further, at no time that morning did Ransom tell the employees that, if they did not perform the work, they would be disciplined or discharged and, particularly because Mays had in fact previously worked on scaffolds started by others, I accept his testimony, in effect, that he would have worked on the assigned scaffold had Ransom not pressed the matter further rather than giving Mays another assignment. Likewise, because there is no evidence that Miller had ever previously questioned management about working on a scaffold started by others, and because Miller at all material times followed Mays' lead in connection with the job assignment and initiated no action on his own, I conclude—as Respondent in effect later concluded in reinstating Miller—that he would likewise have worked on the assigned scaffold if Ransom had pressed the matter further rather than giving Miller another assignment. I am not persuaded otherwise by the employees' failure to protest the scaffold assignment before Ransom abruptly left the gang box, or to direct laborer Adcock to obtain the materials for whoever was eventually assigned to finish the scaffold. I perceive no evidence that the employees' omissions were based on a desire to impose economic pressure on Respondent to induce a change in their assignment. In this connection, I note that the employees asked Steward Wiseman to fetch Foreman Ransom in order to tell him about their reservations concerning the assignment; the fact that the entire incident ended about 50 minutes after the beginning of the workday, during part of which the employees were receiving their initial assignment, discussing the assignment with Ransom for 15 to 30 minutes, and walking to one or the other of the jobs to which they were assigned that morning; the absence of evidence that the employees' pay was "docked" for any part of this period; and the absence of evidence that, after learning that Mays and Miller had not directed Adcock to obtain the materials, Ransom himself asked Adcock to obtain them, asked the labor foreman to issue such instructions to any of the laborers, or made such a request to the laborer who worked with the two carpenters transferred from the trash chutes to the scaffold, and who happened to come to the area immediately after Mays and Miller had left the pulverizer area for the trash chutes.³¹ For the foregoing reasons, I conclude that the conduct of Mays

³¹ Instead, Ransom chose to ask the laborer to send his carpenters to the scaffold, a message which Ransom could have conveyed on the intercom.

and Miller in connection with their initial May 25 work assignment did not constitute a violation of their obligations under the bargaining agreement.³²

Accordingly, I need not and do not determine whether the employees' conduct as described by Ransom would have constituted a breach of the bargaining agreement.³³ Nor need I consider whether Ransom's action in giving them a reassignment to the trash-chute job effected by condonation a loss of any right which Respondent otherwise would have had to rely on the bargaining agreement as a defense to their discharge. See, generally, *Brantly Helicopter Corporation*, 135 NLRB 1412, 1417-18 (1962).³⁴ However, in this connection, I note that after reassigning the employees to work on the trash chutes, on which they worked for more than 2 hours before their discharge, Ransom never told his superiors about any conduct by the employees in connection with the pulverizer C or D scaffold to which they had been originally assigned. Rather, Ransom untruthfully reported to Samic that the employees' conduct had been directed to the job about which Samic had reminded Ransom that morning—that is, installation of the handrails on the pulverizer B scaffold. Moreover, if Ransom had accurately identified to Samic the scaffold where the incident occurred, Samic might well have made a somewhat different report to Wilson, who in consequence might have reached a different decision about what personnel action to take. Although the thrust of Ransom's and Samic's reports was directed to the employees' alleged insubordination, Samic may well have regarded such alleged insubordination as aggravated by its alleged connection with the pulverizer B scaffold, which (unlike the scaffold to which they were really assigned) was a rush job, and whose urgency Samic may well have assumed was communicated to the employees. Indeed, if an accurate report from Ransom about the scaffold involved in his Mays-Miller conversation had led Samic to realize that this conversation had occurred shortly after Samic's remarks to Ransom had reminded him of the forgotten handrail job, Samic might have suggested to Wilson that Ransom's anxiety and self-reproach about his absentmindedness may have led him to overreact to, misapprehend, or to some extent provoke what the employees had said and done.

Ransom's report to Samic about what Miller and Mays had allegedly done was admittedly based on their conduct in connection with their scaffold assignment, and

³² See *Carlson Roofing Co., Inc.*, 245 NLRB 13 (1979); see also *International Harvester Co.*, 12 L.A. 653 (1949); *Commercial Steel Treat Corp.*, 54 L.A. 1114 (1970); *N.L.R.B. v. Electronics Equipment Co., Inc.*, 194 F.2d 650, 653 (2d Cir. 1952).

³³ Cf. *Chrysler Corp.*, 63 L.A. 677, 684 (1974); *Consolidated Edison Co. of New York, Inc.*, 71 L.A. 238, 240-242 (1978).

³⁴ In denying such condonation, Respondent's brief asserts that, immediately after making the reassignment, Ransom told Steward Wiseman that Ransom was not going to "let it slide." Respondent's record reference refers to a conversation which allegedly occurred after Mays and Miller left the jobsite, allegedly leaving Ransom and Wiseman still standing there. For the reasons set forth *supra*, part II, C, 2, I have found that Wiseman was not on the job at any time while Mays, Miller, and Ransom were all there. In any event, Ransom testified that Wiseman advised him to "let it slide," to which Ransom replied that he was going to the office to discuss the matter with Samic.

Wilson's decision to discharge them was admittedly based on Samic's report of what Ransom had told him. I have found that the employees' conduct in connection with that assignment was protected by Section 7 of the Act. Accordingly, their discharge violated Section 8(a)(1) even assuming that no Section 7 protection would have attached to the conduct which Ransom and Samic inaccurately attributed to them. *United Aircraft Corporation v. N.L.R.B.*, 440 F.2d 85, 92 (2d Cir. 1971); *N.L.R.B. v. E.D.S. Service Corporation*, 466 F.2d 157, 158 (9th Cir. 1972), and cases cited; see also *N.L.R.B. v. Burnup & Sims*, 379 U.S. 21 (1964); *N.L.R.B. v. Cambria Clay Products Company*, 215 F.2d 48, 53-54 (6th Cir. 1954).

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. By discharging Robert Mays and Arthur Miller, Respondent has engaged in an unfair labor practice affecting commerce within the meaning of Sections 8(a)(1) and 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that Respondent be required to cease and desist therefrom, and from like or related conduct. Further, I shall recommend that Respondent be required to offer Robert Mays immediate reinstatement to the job of which he was unlawfully deprived, or, in the event such a job no longer exists, a substantially equivalent job, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him and Arthur Miller (who has already been reinstated) whole for any loss of pay they may have suffered by reason of their discharge, from the date of their discharge to the date of a valid offer of reinstatement, to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as described in *Florida Steel Corporation*, 231 NLRB 651 (1977).³⁵ I shall also recommend that Respondent be required to post the appropriate notice.

[Recommended Order omitted from publication.]

³⁵ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).